Boston College Law Review

Volume 4 | Issue 1 Article 20

10-1-1962

Constitutional Law—Ability of Domicile State to Tax Railway Rolling Stock.— Central Ry. Co. of Pa. v. Pennsylvania

John D. O'Reilly III

Recommended Citation

John D. O'Reilly III, *Constitutional Law—Ability of Domicile State to Tax Railway Rolling Stock.— Central Ry. Co. of Pa. v. Pennsylvania*, 4 B.C.L. Rev. 185 (1962), http://lawdigitalcommons.bc.edu/bclr/vol4/iss1/20

a quirk in the anti-trust laws. It is suggested that a manufacturer wishing to have price maintenance should do so by the safe method under state fair trade laws.

JOSEPH L. COTTER

Constitutional Law—Ability of Domicile State to Tax Railway Rolling Stock.—*Central Ry. Co. of Pa. v. Pennsylvania*[1]—Appellant is a Pennsylvania corporation licensed to operate a railroad only in Pennsylvania. It owned 3,074 freight cars, upon which Pennsylvania had imposed an ad valorem property tax.[2] Appellant, in protesting the tax, claimed that during the tax year a daily average of more than 1,659 cars were entirely outside of Pennsylvania[3] and that 1,056 cars were used on lines which were only partly in Pennsylvania, but was unable to show in which particular states the cars were.[4] Appellant argued that the imposition of an unapportioned property tax on the property wholly or partly outside the taxing jurisdiction was violative of the commerce clause of the Federal Constitution and the due process provisions of the Federal and Pennsylvania Constitutions. On appeal from the trial court's judgment, the Supreme Court of Pennsylvania ruled that property which was not shown to have had an actual taxable situs elsewhere was subject to the taxing power of the domiciliary state.[5] On appeal to the Supreme Court of the United States, HELD: Absent any showing of the freight cars' regular routes through or habitual presence in particular non-domiciliary states, the domiciliary state may tax the personal property in full.

---

1 370 U.S. 607 (1962).

2 Pa. Stat. Ann., tit. 72 § 1871 (1936); "Every Domestic corporation . . . shall be subject to . . . a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds . . . ." Ibid. § 1901. "It shall be the duty of every corporation having capital stock . . . to make annually . . . a report . . . setting forth . . . .
First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.
. . .
Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation."
While the tax would seem more akin to a capital stock tax, the Court's consideration is bound by the Pennsylvania Court's construction, Commonwealth v. Union Shipbuilding Co., 271 Pa. 403, 114 Atl. 257 (1921), of its being the equivalent of a property tax. N.Y. Central Ry. v. Miller, 202 U.S. 584, 595 (1906).

3 Pursuant to the provisions of the Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(4)(10)(12) (1958), appellant had entered into an agreement whereby its cars could be used by various other lines on a per diem rental basis. Appellant was in somewhat of an awkward position, as it did not know exactly where the individual cars had been; only that a particular out-of-state line had used them for a designated number of rental days.

4 Appellant claimed that that stock which had been used by lines having a portion of their trackage in Pennsylvania should be taxed by Pennsylvania in the same proportion as the trackage in that state bears to the total trackage.

5 403 Pa. 419, 169 A.2d 878 (1961).

While it can no longer be doubted that interstate business must pay its way,[6] the type of taxation imposed by the various states must not be such that interstate commerce bears a tax burden disproportionate to that of local commerce.[7] Thus, where property used in interstate commerce has acquired an actual tax situs in one jurisdiction, other jurisdictions, may not impose a tax which is inconsistent with the former jurisdiction's right to tax,[8] lest "[i]nterstate commerce . . . be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."[9] If it can be shown that the tax imposed by the particular jurisdiction will be exclusive of all other property taxes imposed by other jurisdictions there is obviously no risk of the objectionable double burden.[10] Similarly, the state tax is not objectionable if it is fairly apportioned to the use of the property within the state.[11] There are two types of fact situations which are of particular significance in a consideration of the power of a domicile state to tax in full property used in interstate commerce.

Intangibles, being "but relationships between persons . . . which the law recognizes by attaching to them certain sanctions enforceable in court"[12] can be subject to multiple taxation without violating due process. This result has also been based on the fact that as a practical matter, the intangibles, having no situs, might otherwise escape taxation entirely. The same theory has been applied to tangible property which has no definite situs: if the state of the domicile of the owner is not permitted to tax, the property will be free from taxation anywhere.[13] *Pullman's Car Co. v. Pennsylvania*[14] established that the habitual presence of railroad rolling stock in a non-domiciliary state, despite the individual items of stock constantly changing in number and identity, would justify a tax which was reasonably apportioned in relation to the railroad's use of the state's facilities. *N.Y. Central H. Ry. v. Miller*[15] refused to adopt a proposed corollary to *Pullman*, that if a certain average percentage of rolling stock is in a non-domiciliary state, the taxing power of the domiciliary is pro tanto diminished. The language in *Miller*, however, makes it quite apparent that the Court had misconstrued the facts and holding of *Pullman*. Speaking for the Court, Mr. Justice Holmes stated that

[6] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); Postal Tel.-Cable Co. v. Richmond, 249 U.S. 252 (1919).

[7] Baldwin v. Seelig, 294 U.S. 511 (1935).

[8] Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[9] Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

[10] Railway Express Co. v. Virginia, 358 U.S. 434 (1959); Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911); Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905).

[11] American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

[12] Curry v. McCanles, 307 U.S. 357, 366 (1939).

[13] Until the *Miller* case, infra note 15, the cases embodying this principle had dealt with ships at sea, in which case the only contact the taxable property would have with another taxing jurisdiction would be the entry into the various ports of call, which entry is insufficient to establish a tax basis. It is interesting to note that such a tax is allowable even though the taxing jurisdiction does not border the sea and will consequently never have any actual contact with the tax property. Southern Pac. Co. v. Kentucky, supra note 10.

[14] Supra note 11.

[15] Supra note 2.

Pullman involved the *same* cars constantly in Pennsylvania jurisdiction.[16] The *Pullman* opinion seems to make it clear that it is the *average* number of cars in the non-domiciliary state that establishes the tax basis, rather than a requirement of the same cars being constantly present.[17] Unfortunately, this loose language in *Miller* has led to "occasional erroneous judicial intimation or declaration,"[18] to the effect that the constant presence in a particular non-domicile jurisdiction is necessary for that jurisdiction to tax.[19] The speculation as to whether, on a correct consideration of *Pullman's* holding, the *Miller* Court would have allowed the showing of the constant presence of an average percentage of rolling stock outside of the domicile to require a diminishing of the domicile's tax is given added weight by the circumstances in which the *Miller* opinion was written. In the previous year, *Union Refrigerator Transit Co. v. Kentucky*[20] had established, on a showing that only one to three per cent of the railroad's cars were within the domicile state, that the cars rented to out-of-state corporations were not subject to the taxing power of the domicile state. In *American Refrigerator Transit Co. v. Hall*,[21] a stipulation was made that the taxpayer's cars "never were run in [a non-domiciliary state] in fixed numbers nor at regular times nor as a regular part of particular trains" and were "only transiently present in said state." Nevertheless, it was determined that the non-domiciliary could tax the average amount of cars in the state even though it might occur that on a particular day no cars would be in the taxing jurisdiction. As *Miller* did not feel compelled to distinguish these prior decisions, it can only be assumed that the two are not inconsistent. One possible basis for compatibility is the fact that in *Miller* there was a showing that the particular rolling stock was in the domicile state for part of the tax year.[22] The dispute between the

16 "But in that case . . . [t]he same cars were constantly receiving the protection of the State and, therefore, it was just that the state should tax a proportion of them." Id. at 597.

17 "[P]articular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State. . . ." This position is confirmed by Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590 (1954), where planes regularly using the facilities of Nebraska were taxed even though not always the same specific planes were present. The *Miller* requirement of a "continuous average" in the non-domiciliary state is self-contradictory. See T. R. Powell, Northwest Airlines v. Minnesota, 57 Harv. L. Rev. 1097, 1107 (1944).

18 Powell, supra note 17, at 1098.

19 E.g., Mr. Justice Frankfurter in Northwest Airlines v. Minnesota, 322 U.S. 292, 298 (1944). "But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks. Such was the unanimous decision in the Miller case or Miller decided nothing." It is interesting to see how this view was apparently altered in the subsequent *Peck* case where Mr. Justice Frankfurter participated but failed to dissent from the Court's position that property traveling between various other jurisdictions could not be taxed in full by the domicile. See infra note 27.

20 199 U.S. 194 (1905).

21 174 U.S. 70 (1899).

22 "We must assume, further, that no part of the corporate property in question was outside of the state during the whole tax year." N.Y. Central v. Miller, supra note 2, at 595. Even this basis of compatibility would be destroyed by *Peck*, infra note 23, as the property in that case was located for a limited time within the domicile state.

majority and dissenting opinions in the instant case seems not to be whether *Miller* still validly stands for the proposition that personal property, lacking any showing of a definite tax situs elsewhere, is subject to taxation in full at the domicile, but is, rather, the extent to which one must go to show a tax situs elsewhere.

Since the *Miller* decision there has frequently been language to the effect that the ability of a state to tax is limited to a corresponding relation to the opportunities, benefits or protection which the taxing state gives the property.[23] This has been applied to both domiciliary[24] and non-domiciliary states.[25] There also seems to have been fostered a rationale that, unlike those tangibles which by their nature could not acquire a situs elsewhere,[26] river boats and railway rolling stock must necessarily be in some taxing jurisdiction, either the domicile's or elsewhere, and, therefore, any tax by one state must be compatible with the ability of the other to tax. Thus *Standard Oil Co. v. Peck* disregarded the holdings of *Miller* and *Northwest* that the domicile could tax personal property in full unless a defined part of the domiciliary corpus had acquired a taxable situs in a particular jurisdiction.[27] The Court held that the mere showing that the property was in some other undesignated taxing jurisdictions precluded the domicile state from taxing it in full.[28] Similarly in *Johnson Oil Co. v. Oklahoma*[29] on a showing that cars, in making trips from refineries in Oklahoma to a plant at the domicile state,

---

[23] Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590 (1954); Standard Oil v. Peck, 342 U.S. 382 (1953).

[24] Standard Oil v. Peck, supra note 23.

[25] Braniff Airways, Inc. v. Nebraska State Bd., supra note 23; Ott v. Mississippi Barge Line, 336 U.S. 169 (1949); Johnson Oil Co. v. Oklahoma, supra note 8.

[26] Southern Pac. Co. v. Kentucky, supra note 13.

[27] "[*Miller* and *Northwest*] have no application here since most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year. No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Barge Line Co., supra, could be taxed by the several states on an apportionment basis." Standard Oil v. Peck, supra note 23, at 384.

[28] This rationale of *Peck* was adopted by the Supreme Court of California in Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal. 2d 314, 333 P.2d 323 (1958), cert. denied, 359 U.S. 1001 (1959), over a strong dissenting opinion that a taxable situs cannot be assumed to have been acquired on the mere showing of absence from the jurisdiction. 51 Cal. 2d at 327, 333 P.2d at 331.

The instant case's attempt at reconciliation with *Peck* by claiming that the facts of *Peck* show a tax situs elsewhere does not seem justified by the record in *Peck*. This record did not show the location of the particular riverboats in any specific state, but only indicated the barrel mileage of the interstate routes traveled by the various riverboats. Record, p. 102. See also the dissenting opinion of Mr. Justice Minton:

> In the case at hand, the *vessels had not acquired* a situs for taxation in any other state. They were at large in the Ohio and Mississippi Rivers, touching ports therein from time to time. There was no showing as to how much time any of the vessels spent in any state. Indeed, the time spent in any state by the vessels plying the Mississippi could not be shown with any accuracy, as the states on each side own to the middle of the stream. The navigation channel might be on either side of the center line or right on the center line. Who is to say what state the vessels are in?

342 U.S. at 386.

[29] Supra note 8.

Illinois, spent only a minimal time in Illinois, the Court in denying Oklahoma's right to tax in full, stated that the taxable situs was neither in Illinois nor in Oklahoma and was presumably to be allocated to the remaining states over which the cars ran on their various routes from the refineries to Illinois. The Court did not consider whether there was a sufficient showing of a situs elsewhere; from the nature of rolling stock, it seems to have assumed the presence of a situs elsewhere.

It is upon such a history of confusion caused by loose language and seemingly conflicting opinions that the present case arose. The Court's strong reliance on *Miller* in a fact situation where *Miller* is possibly distinguishable, particularly in view of the recent restrictions by implication on *Miller*, cannot but add confusion to the area. The Court's requirement of a showing of a fixed and regular route in specific non-domiciliary states to establish a tax situs there is inconsistent with *Ott*,[30] *Union Refrigerator*[31] and *Johnson*.[32] Logically, it would seem the Court's reasoning that the presence of a fixed and regular route, *without a showing of the time spent in each state*, is indicative of a tax situs elsewhere, whereas a showing that the property was constantly moving on other lines is not so indicative, is unsound. As a practical matter the Court seems to think that the likelihood of being taxed elsewhere is greater on a fixed route than on routes constantly changing with the demands of the industry. As prior cases show, and as the Court must admit, the appellant's cars might be located through the ingenuity of the tax collector regardless of the taxpayer's ignorance of their exact location. It is therefore submitted that a situation in which the taxpayer is on a fixed route but irregular schedules (*Peck*) would not increase the likelihood of non-domicile taxation any more than would the constant but irregular movement through other tax jurisdictions (*Central*).

There is thus presented the question whether the mere possibility of double taxation is enough to violate the commerce clause. It would seem that the mere exposure to the risk of a double tax burden would be forbidden by the commerce clause.[33] The fact that another state actually does or does not impose a tax on the property is immaterial.[34] It is "the risk of multiple taxation [which] creates the unconstitutional burden which actual taxation by both states would impose in fact."[35] Since this risk of double taxation is

30 ". . . there was no showing that the particular portion of the property sought to be taxed was regularly and habitually used and employed in Louisiana for the whole of the tax year." 336 U.S. at 175.

31 ". . . and said cars never were run in said State in fixed numbers nor at regular times . . . ." 177 U.S. at 153.

32 Supra note 8.

33 "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile." Standard Oil v. Peck, supra note 23, at 384; see also Adams Mfg. Co. v. Storen, supra note 9.

34 Northwest Airlines v. Minnesota, supra note 19.

35 Separate opinion of Mr. Justice Rutledge, International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 360 (1944). But cf. the dissenting opinions of Mr. Justice Black in Adams Mfg. Co. v. Storen, supra note 8, at 316, and in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939). "If there are limits to that power [of a state to tax gross receipts], there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination." Id. at 445.

constantly present with respect to personal property which must pass its time in other taxing jurisdictions,[36] a standard should be formulated which allows consideration of the practical risk involved rather than, as the instant case seems to do, allow a full tax by the domicile in a fact situation which, as a practical matter, presents no greater danger of the offensive double taxation than did previous situations where the full domicile tax was denied.[37]

JOHN D. O'REILLY, III

Contracts—Impossibility Occurring after Breach Limits Damages.— ***Model Vending, Inc. v. Stanisci.***[1]—Plaintiff and defendant entered into a written agreement whereby plaintiff was to have the exclusive right to place vending machines in defendant's bowling alley for a period of five years. Eleven months later defendant breached the contract by commencing to sell similar merchandise at his newly established snack bar. Plaintiff filed suit for breach of contract and resulting damages for loss of profits for the entire term of the contract, but while the suit was pending[2] defendant's bowling alley was destroyed by fire. HELD: The destruction of the premises on which the contract was to be performed made the contract impossible of performance as of that date, and although defendant had breached the contract before the fire, plaintiff was entitled to recover only for loss of profits up to the time of the fire and not for the entire term of the contract.[3]

Full damages have been recovered when the promisor's breach causes the loss resulting from the supervening impossibility to shift to the promisee. Thus, in *Mills v. Indemnity Ins. Co. of North America*[4] full damages were recovered against defendant subcontractor's surety when, after breach by the subcontractor and the consequent resumption of certain bridgework by the plaintiff, the bridgework was destroyed by fire. The court said, "While the high water was the immediate cause of the loss, he would not have been placed in the position to have incurred the loss had it not been for the wrongful act of the Metal Products Company."[5]

The instant court, finding no precedent in New Jersey,[6] gathered sup-

---

[36] Ott v. Mississippi Valley Barge Line Co., supra note 25; Standard Oil v. Peck, supra note 23, at 384.

[37] Standard Oil v. Peck, supra note 23.

---

[1] 74 N.J. Super. 12, 180 A.2d 393 (1962).

[2] See Brief for Defendant, p. 1.

[3] The following articles are of particular interest on the general topic: Conlon, The Doctrine of Frustration as Applied to Contracts, 70 U. Pa. L. Rev. 87 (1922); Page, The Development of the Doctrine of Impossibility of Performance, 18 Mich. L. Rev. 589 (1920); Patterson, Constructive Conditions in Contracts, 42 Colum. L. Rev. 903, 943 (1942); Smith, Frustration of Contract: A Comparative Attempt at Consolidation, 58 Colum. L. Rev. 287, 307 (1958).

[4] 114 W.Va. 263, 171 S.E. 532 (1933).

[5] Ibid.

[6] The court was perhaps moved by the decision in Von Waldheim v. Englewood Heights Estates, 115 N.J.L. 220, 179 Atl. 19 (1935), where plaintiff, a defaulting buyer under an installment contract for the sale of real estate, was held entitled to a return